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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. EMMANUEL YOUNG, Defendant and Appellant.	B236185 (Los Angeles County Super. Ct. No. PA063445)

APPEAL from the judgment of the Superior Court of Los Angeles County. Lesley C. Green, Judge. Affirmed as modified and remanded with directions.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Emmanuel Young was convicted by jury of attempted premeditated murder, mayhem, torture, and infliction of corporal injury on a cohabitant. The jury also found true the special allegations that defendant used a knife in the commission of the offenses, and inflicted great bodily injury on the victim, his girlfriend, who was left paralyzed by the attack. The court sentenced defendant to a life term, plus six years, with the possibility of parole. Defendant was awarded a total of 1,107 days of presentence custody credits.

Defendant contends he was denied the effective assistance of counsel because his lawyer failed to properly seek admission of a purported exculpatory statement he made before his arrest. Defendant argues the failure to present such evidence was prejudicial because it denied him a fair trial and the ability to put on a defense, primarily as to the special allegation of premeditation. Defendant also contends he is entitled to three additional days of custody credits.

Respondent argues the statement was inadmissible and defense counsel did not render ineffective assistance in failing to obtain its admission, but concedes defendant is entitled to the additional custody credits. We modify the judgment to reflect the correct number of custody credits and remand for a modification of the abstract of judgment. We otherwise affirm the conviction.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the background pertinent to the issues raised on appeal, but do not discuss all of the factual details supporting the conviction as defendant has not raised a substantial evidence claim.

In January 2009, defendant was living with his then-girlfriend, Natalie Rashkov, at an apartment in the city of North Hills. Defendant and Ms. Rashkov had been dating for about four months, after having met while residents of a sober living facility. Both defendant and Ms. Rashkov drank alcohol regularly and used methamphetamine, sometimes on a daily basis. Their relationship was "unstable," consisting of a lot of arguments which often resulted in defendant hitting Ms. Rashkov. Defendant had previously punched Ms. Rashkov in the face and had also attempted to strangle her.

On the morning of January 7, 2009, defendant and Ms. Rashkov woke up, had breakfast, and smoked some methamphetamine. Defendant left around 8:30 a.m. to walk to the bus stop to catch the bus he rode to work. Ms. Rashkov remained at the apartment and continued to get ready to go to barber school. After walking to his bus stop, defendant decided not to go to work and, instead, returned home about an hour later.

Ms. Rashkov was surprised to see defendant and concerned he was going to miss a day of work. Defendant and Ms. Rashkov argued about defendant going to work and also about defendant wanting to smoke more methamphetamine. Eventually, defendant accused Ms. Rashkov of staying home from school to cheat on him with other men. Defendant started crying and "flipping out" and lay down on the floor in their bedroom. At some point, defendant went into the kitchen and put a number of sleeping pills into a glass of wine. Defendant talked about both of them drinking the "concoction" and dying together like Romeo and Juliet. Ms. Rashkov snatched the glass from defendant and threw it into the sink. Because of his talk of suicide, Ms. Rashkov called a crisis center for help in handling the situation. After that, she telephoned defendant's mother, hoping she could speak with him and calm him down.

Ms. Rashkov gave the phone to defendant, and he spoke to his mother for a half-hour or so. After defendant got off the phone, Ms. Rashkov decided to take him to the Northridge Hospital emergency room. Ms. Rashkov thought defendant needed to calm down, talk to a doctor, and get a note that he needed medical care to show to his employer and hopefully avoid being fired. Before they were able to leave for the hospital, defendant's brother, Prince Young,[1] phoned. Ms. Rashkov answered the phone and told him what was going on with his brother and that they were headed to the hospital. Prince told her to wait, that he would come to the apartment, and they could take defendant to the hospital together. When Ms. Rashkov hung up the phone, defendant attacked her.

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[1] Due to the common surname, we will refer to Prince Young by his first name only to avoid confusion, intending no disrespect by the informality.

Defendant punched Ms. Rashkov on the side of the head, knocking her to the floor. He proceeded to beat and kick her repeatedly. Ms. Rashkov held her arms up around her head and face, hoping to prevent defendant from knocking out her teeth or damaging her face. At one point, he picked up a metal folding chair and hit her with that as well. Ms. Rashkov pleaded with defendant to stop, but it seemed to make him angrier.

Defendant then told her he needed to use the bathroom, and dragged Ms. Rashkov, who was still on the floor, to the bathroom with him. While in the bathroom, defendant tried to cut Ms. Rashkov's throat with electric clippers. When she began screaming for help, he hit her, yelled at her to be quiet, and banged her head repeatedly into the toilet tank. The toilet tank eventually broke and Ms. Rashkov lost consciousness. Defendant later dragged her into the kitchen.

Reyna Ortiz and Adriana Escamillo, neighbors in the apartment building, heard yelling coming from defendant and Ms. Rashkov's apartment. They heard defendant cursing, loud bangs from the bathroom area of the apartment, and Ms. Rashkov crying for help. Ms. Ortiz looked in the bathroom window and saw defendant hitting Ms. Rashkov. Ms. Escamillo called 911 and stayed on the line with the operator until police arrived.

Sometime around 4:00 p.m., Prince arrived at the apartment. When defendant opened the door and Prince stepped in, Prince saw Ms. Rashkov lying on the kitchen floor, covered in blood. Defendant was pacing back and forth, with blood on his clothes. The apartment looked disheveled. Prince told his brother to step out of the apartment, and they both walked down to the sidewalk near the parking lot, while Prince dialed 911. As Prince was talking to the 911 operator, several Los Angeles police officers arrived on the scene and detained Prince and defendant. One of the officers who responded to the dispatch call was an Officer Lutges.

Also responding to the scene was Officer Allen Cheng and his partner, who arrived shortly after 4:00 p.m. Officer Cheng and his partner were assigned to watch over defendant and to transport him to the hospital to receive medical treatment for a cut on his hand. On the way to the hospital and while in the emergency room, defendant volunteered various statements to Officer Cheng and his partner, including, "I am going

to jail because I killed my girlfriend," and "I was trying to kill myself and my girlfriend tried to stop me, and that's how I killed her." Defendant also repeatedly asked if Ms. Rashkov was dead. Defendant never told Officer Cheng that Ms. Rashkov had attacked him with a knife.

Later that same evening after defendant was transported to the police station, defendant was interviewed by Detective Ryan Verna. The interview was recorded on audiotape. Detective Verna, and his partner Detective Flemming, repeatedly asked defendant what had happened at the apartment. Defendant never said anything to suggest that Ms. Rashkov had come at him with a knife. Defendant also denied that his brother was involved. Prince was interviewed at the station, and then released.

Defendant was charged with four counts arising from the January 7, 2009 incident: (1) attempted premeditated murder (Pen. Code, §§ 187, subd. (a), 664)[2]; (2) mayhem (§ 203); (3) infliction of corporal injury on a cohabitant (§ 273.5, subd. (a)); and (4) torture (§ 206). It was also specially alleged that defendant personally used a knife in the commission of all four offenses (§ 12022, subd. (b)) and, as to counts 1 and 3, that defendant inflicted great bodily injury (§ 12022.7).

Trial by jury proceeded in July 2011. During a pretrial discussion of motions in limine, defense counsel opposed the prosecutor's motion to exclude any reference to Ms. Rashkov's prior use of methamphetamine. Defense counsel explained the defense theory was that Ms. Rashkov had a history of acting violently and taking drugs, both of which were relevant to explain what happened on January 7, 2009, including that defendant had acted, at least in part, in self-defense or in a spontaneous act of rage, but not with premeditation or a sadistic intent. He explained defendant had a "defensive" wound on his hand and defendant had made a statement to a police officer at the scene that "he was attacked" by Ms. Rashkov. The prosecutor objected that any prior statement by defendant to an officer would be hearsay unless offered against him by the prosecution. The court agreed. The court ruled that defendant would be allowed to offer evidence of

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2 All undesignated statutory references are to the Penal Code.

Ms. Rashkov's drug and alcohol use, and to inquire about her prior convictions and her three-day hospital stay in August 2008 for mental health reasons.

Ms. Rashkov was the primary prosecution witness. She testified and described the events of January 7, 2009, in detail. She denied slapping defendant or attacking defendant with a knife. Ms. Rashkov explained she did not know exactly how defendant stabbed her in the back of the neck because she lost consciousness after he hit her head against the toilet tank. She said after being dragged into the kitchen, she tried to get up once defendant and Prince left the apartment, but she realized she could not get up. In struggling to stand, she discovered a cell phone under her body. Ms. Rashkov called 911 and the audio recording of her call was played for the jury.

Dr. David Hanpeter, the trauma surgeon who treated Ms. Rashkov when she was brought in by ambulance to the emergency room at Holy Cross Medical Center, also testified. He described Ms. Rashkov's injuries as life threatening, with extensive bruising on her face and extremities, the loss of over half of her blood volume, and multiple stab wounds to the back of her neck, one of which severed her spinal cord. Dr. Hanpeter explained the use of "major force" was required to cause the type of injury Ms. Rashkov suffered to her spine.

Ms. Ortiz and Ms. Escamilla, the two neighbors, testified to what they saw and heard that afternoon. They both heard Ms. Rashkov crying and yelling for help, explaining she sounded "desperate" and "[f]ull of terror." Ms. Ortiz heard arguing in the afternoon, and then she heard loud banging coming from the apartment, "like hitting on walls" or "hitting something with metal." She believed it was coming from the bathroom, and she heard defendant yelling and cursing, calling Ms. Rashkov a "prostitute" and a "bitch," and also using the " 'F' word." When she went down the outside stairs in the apartment building to look for her little boy who was outside playing, she looked in the bathroom window of defendant's apartment and saw defendant hitting Ms. Rashkov. Ms. Rashkov then stopped screaming.

Ms. Escamilla testified similarly. She also went outside in response to Ms. Rashkov's screaming. Ms. Escamilla phoned 911 and stayed on the phone with the

operator relaying what she was hearing, and also what Jessica T., a girl who also lived in the building, was telling her was happening. Jessica was looking through the bathroom window. The audiotape of the 911 call was played for the jury. Ms. Escamilla heard defendant yelling and cursing, including "[s]hut up. Fuck you, bitch." She heard a lot of loud banging, the sound of water running, and then Ms. Rashkov's cries stopped. She said that Jessica indicated defendant put his hand over Ms. Rashkov's mouth, she appeared to faint, and defendant dropped Ms. Rashkov to the floor and turned off the bathroom light.

During the testimony of Detective Verna, the audio recording of defendant's statement at the police station was played for the jury. Detective Verna testified defendant was asked multiple times during the interview why the assault took place, and defendant never once stated Ms. Rashkov attacked him with a knife, or at all. Defendant said only that Ms. Rashkov was trying to calm him, tried to stop him from killing himself, and did not deserve to be assaulted.

On cross-examination, defense counsel asked Detective Verna if, as the investigating officer, he had reviewed the incident report of Officer Lutges, who had responded to the scene and spoken to defendant. The prosecutor raised an objection and a sidebar discussion was held. The prosecutor argued any statement from defendant contained in Officer Lutges's report would be hearsay. Defense counsel argued the report indicated defendant told Officer Lutges that Ms. Rashkov attacked him with a knife. Neither the express statement nor Officer Lutges's report was presented to the court in defendant's offer of proof, but counsel described the statement generally as a voluntary utterance by defendant to Officer Lutges, while still outside the apartment, shortly after the assault, to the effect that Ms. Rashkov had attacked him with a knife. The court ruled the statement, offered through Detective Verna, would be inadmissible hearsay. Defense counsel said he would call Officer Lutges as a witness.

At the end of the court day, the trial court advised the parties to meet and confer about the admissibility of the statement to Officer Lutges, and to be prepared to argue the issue at the start of the next court day. In the morning, defense counsel advised he would

not be pursuing the testimony of Officer Lutges because he could "achieve the same thing" through defendant's direct testimony, as defendant would be testifying in his own defense.

Detective Verna completed his testimony and the prosecution rested. Defendant's brother, Prince, was the first witness called by the defense. He testified about going over to the apartment on January 7, 2009, and what he observed. Prince admitted he told the police that when he first arrived at the apartment, defendant said, among other things, that "I am in trouble. I am going to jail for a long time." Prince described the scene at the apartment as "shocking" and "traumatizing." He called 911 because Ms. Rashkov's injuries appeared life threatening.

Defendant testified in his own defense. He described the events on the morning of January 7, 2009, substantially the same as Ms. Rashkov had testified, including how the day started, not catching his bus, coming home and arguing with Ms. Rashkov, and her efforts to calm him down. Defendant said Ms. Rashkov did call a crisis center and also his mother. He admitted he made the "concoction" of wine and sleeping pills to try to kill himself and that Ms. Rashkov slapped it away from him and tried to stop him from committing suicide.

Defendant explained that everything "got out [of] hand" after that. He said she called him a name and slapped him, and then he punched her several times with his fist and knocked her to the ground. Defendant said he called Ms. Rashkov "a stupid bitch" for having broken the glass with the "concoction" in it. He punched her several times while she was on the ground. Defendant then went back to the kitchen and that, he believed, was when Ms. Rashkov got up off the floor and came at him with a knife. Defendant put his hand up to block it and got cut by the knife on his palm. Defendant testified he remembered everything that happened that day up to Ms. Rashkov coming at him with the knife, but he did not have any memory of what happened after that point. The next thing he remembered was seeing his brother, Prince, at the door. During cross-examination, defendant conceded he did not recall the incident clearly, and therefore it

was possible his hand slipped along the knife during the stabbing of Ms. Rashkov, and that caused the wound on his palm, not because Ms. Rashkov cut him.

When defense counsel asked defendant if he recalled speaking to Officer Lutges outside his apartment before being taken to the hospital, defendant said he did not remember any such conversation. Defendant did not recall speaking with any law enforcement officer, including his taped interview with Detectives Verna and Flemming. He did acknowledge that it was his voice on the audiotape played for the jury. No evidence was offered through defendant about any prior statement to Officer Lutges, or any other officer, to the effect that Ms. Rashkov attacked him with a knife. Officer Lutges was not called as a witness.

The jury convicted defendant on all four charges, and found true the special allegations. Defendant was sentenced to an aggregate state prison term of life, plus six years, with the possibility of parole. The court identified count 1, the attempted premeditated murder charge, as the base count and imposed a life term. The court imposed a consecutive five-year term for the great bodily injury allegation (paralysis), plus a consecutive one-year term for the personal use of a knife allegation. The court imposed the high terms on counts 2, 3 and 4, but stayed the sentences pursuant to section 654.

Defendant was awarded 963 actual days, plus 144 days of conduct credits, for a total of 1,107 days of presentence custody credits. Defendant was also ordered to pay various fines and penalties. This appeal followed.

DISCUSSION

1. Ineffective Assistance Claim

Defendant argues he was denied his constitutional right to the effective assistance of counsel, because his appointed lawyer failed to properly seek admission of the statement he made to Officer Lutges shortly after the incident, which he contends was material to his credibility as well as to his defense that he had not acted with premeditation. We disagree.

The burden is on defendant to establish ineffective assistance by a preponderance of the evidence. (*People v. Ledesma* (1987) 43 Cal.3d 171, 218 (*Ledesma*).) There are two elements to an ineffective assistance claim. "[A] defendant seeking relief on the basis of ineffective assistance must show both that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Cudjo* (1993) 6 Cal.4th 585, 623 (*Cudjo*), citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-696 (*Strickland*).)

On direct appeal, this burden can be stringent. When the record on appeal " ' "sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," *the claim on appeal must be rejected*.' [Citation.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding. [Citations.]" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 (*Mendoza Tello*), italics added; *People v. Jones* (2003) 29 Cal.4th 1229, 1254 [ineffective assistance claim properly resolved on direct appeal only where record affirmatively discloses no rational tactical purpose for counsel's actions].)

There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.]." (*Strickland*, *supra*, 466 U.S. at p. 689.) Moreover, "prejudice must be affirmatively proved. [Citations.] 'It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.] Specifically, '[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder

would have had a reasonable doubt respecting guilt.' . . . [Citation.]" (*Ledesma, supra*, 43 Cal.3d at pp. 217-218.)

The failure to present specific evidence or witnesses, ask certain questions in direct or cross-examination, or make certain objections to evidence are traditionally deemed to fall within the realm of trial tactics over which the court will not engage in "judicial hindsight." (*People v. Beagle* (1972) 6 Cal.3d 441, 458, superseded by statute on other grounds as stated in *People v. Rogers* (1985) 173 Cal.App.3d 205, 208-209.)

Defendant concedes any statement he made to Officer Lutges was hearsay. However, he argues a reasonably competent defense lawyer would have called Officer Lutges to testify and would have been prepared to argue the three separate bases upon which admission of the hearsay statement through Officer Lutges was proper: (1) as a spontaneous statement or utterance pursuant to Evidence Code section 1240; (2) as a prior consistent statement pursuant to Evidence Code sections 1236 and 791; or, (3) on constitutional grounds as material evidence in support of his theory that he acted in the heat of passion and not with premeditation. We address each basis in turn.

a. Spontaneous statement exception

Defendant first argues his statement to Officer Lutges qualified as a spontaneous utterance made while he was still under the stress of the incident. "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." (Evid. Code, § 1240.) "A spontaneous declaration is admissible, despite its character as hearsay, because of its particular reliability as the immediate product of direct perception, before fading memory or the opportunity for fabrication has intervened." (*People v. Arias* (1996) 13 Cal.4th 92, 150; see also Law Rev. Com. com., Evid. Code, § 1240 [rationale for exception is "the spontaneity of such statements and the consequent lack of opportunity for reflection and deliberate fabrication [which] provide an adequate guarantee of their trustworthiness"].)

In order for a hearsay statement to be admissible as a spontaneous declaration, there must be evidence showing " '(1) . . . some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been *before there has been time to contrive and misrepresent*, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.' [Citations.]" (*People v. Poggi* (1988) 45 Cal.3d 306, 318, italics added.)

" ' "The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is . . . not the nature of the statement but the mental state of the speaker. The nature of the utterance—how long it was made after the startling incident and whether the speaker blurted it out, for example—may be important, but solely as an indicator of the mental state of the declarant. . . . [U]ltimately each fact pattern must be considered on its own merits, and the trial court is vested with reasonable discretion in the matter." ' [Citation.]" (*People v. Williams* (2006) 40 Cal.4th 287, 318 [court properly excluded defendant's self-serving statements minimizing culpability and crying which took place during police interrogation several hours after the murder].)

The statement to Officer Lutges was made while defendant and his brother were being detained by police outside the apartment. There were multiple police officers on the scene and defendant had already said to his brother that he knew he was going to jail for a long time for what he had done. The statement occurred *after* there was a reasonable period of time for defendant to "contrive and misrepresent" (*People v. Poggi, supra,* 45 Cal.3d at p. 318) in order to minimize his culpability. The trial court would have been well within its discretionary authority to conclude the statement did not qualify as a spontaneous declaration, even if Officer Lutges had been called to testify about his interaction with defendant. The trial court's discretion is " ' "at its broadest" when it determines whether an utterance was made while the declarant was still in a state of

nervous excitement. [Citation.]' [Citation.]" (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1271.)

Defense counsel tried to offer evidence of the statement during defendant's direct testimony, but defendant testified he did not recall his conversation with Officer Lutges. The record does not reveal why defense counsel did not call Officer Lutges to testify about the statement. Perhaps counsel did not call Officer Lutges because counsel did not believe he could get any such statement into evidence through Officer Lutges, for any number of reasons. Defendant has not shown that counsel's tactical decision to attempt to elicit the evidence through his own testimony, and not through Officer Lutges, was below the standard of a reasonably competent attorney. Moreover, counsel was not required to make an unmeritorious argument for admission of the hearsay statement when it was not likely to qualify as a spontaneous utterance. (*People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 836 (*Szadziewicz*) ["Counsel's failure to make a futile or unmeritorious motion or request is not ineffective assistance."].)

b. Prior consistent statement

Defendant next argues that even if the statement to Officer Lutges did not qualify as a spontaneous utterance, a competent defense lawyer would have sought its admission as a prior consistent statement. "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791." (Evid. Code, § 1236.) Evidence Code section 791 provides, in relevant part: "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: [¶] . . . [¶] (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen."

Defendant contends defense counsel should have sought admission of defendant's prior statement to Officer Lutges under subdivision (b) of Evidence Code section 791. Defendant argues the prosecutor's cross-examination of defendant and her questioning of

Detective Verna raised the inference that defendant's trial testimony that Ms. Rashkov attacked him with a knife was a fabrication made up specifically for trial to attempt to mitigate his culpability.

A prior consistent statement is admissible under Evidence Code section 791 so "long as the statement is made *before* the existence of any one of the motives that the opposing party expressly or impliedly suggests may have influenced the witness's testimony." (*People v. Noguera* (1992) 4 Cal.4th 599, 629, italics added.) Respondent correctly points out that any statement defendant may have made to Officer Lutges outside the apartment was made *after* defendant had a strong motive to fabricate or attempt to minimize his culpability. The evidence, and reasonable inferences therefrom, showed there were multiple police officers who responded to the scene and that defendant was being detained at the time any statement was made to Officer Lutges, even assuming defendant had not been formally placed under arrest. And, defendant had already expressed to his brother that he knew he was going to jail for what he did to Ms. Rashkov. Defendant plainly had a motive to fabricate and claim self-defense at the time the purported consistent statement was made.

There is an exception to the general rule of admissibility for prior consistent statements. "Different considerations come into play when a charge of recent fabrication is made *by negative evidence* that the witness did not speak of the matter before when it would have been natural to speak." (*People v. Gentry* (1969) 270 Cal.App.2d 462, 473.) When the witness's former silence is argued as inconsistent with his or her trial testimony, the "evidence of consistent statements at that point becomes proper because 'the supposed fact of not speaking formerly, from which [the jury is] to infer a recent contrivance of the story, is disposed of by denying it to be a fact, inasmuch as the witness did speak and tell the same story.' [Citations.]" (*Ibid.*; accord, *People v. Williams* (2002) 102 Cal.App.4th 995, 1011-1012.)

Defense counsel argued below that he felt the prosecutor was attempting to raise such a negative inference by questioning Detective Verna about defendant's failure to ever say during the interview that Ms. Rashkov had attacked him. Defendant argued the

prosecutor should be prevented from trying to bolster her claim defendant was fabricating his trial testimony by arguing that defendant had *never* made that claim previously. The court agreed with defense counsel in part and told the prosecutor she should limit her argument "to saying that the defendant in that initial interview never made those statements to Detective Verna and Detective Flemming" but to not insinuate that defendant never made such a statement to anyone. In closing, the prosecutor did not imply that defendant had never made the statement at any time, arguing only that "common[sense] says" that if he had been attacked by Ms. Rashkov, he would have told Detectives Verna and Flemming when he was being interviewed.

Even if we were to assume, for the sake of argument, that defendant could have elicited the alleged statement of defendant from Officer Lutges, defendant has failed to establish the second prong of *Strickland*. Defendant has not shown that it is "reasonably probable a more favorable determination would have resulted in the absence of counsel's failings." (*Cudjo*, *supra*, 6 Cal.4th at p. 623.) Defendant overstates the significance of the purported statement to Officer Lutges. Defendant argues that had the statement been admitted, it would have not only bolstered his credibility on the issue of Ms. Rashkov attacking him and precipitating the attack, but it also would have supported his defense that the assault was an explosion of rage, lacking any premeditation or sadistic intent. Defendant argues the statement was crucial because the intent issues turned on a credibility assessment of defendant and Ms. Rashkov.

The argument is not persuasive. First, a portion of the assault was seen and heard by Ms. Ortiz and Ms. Escamillo, the two neighbors, whose testimony largely corroborated Ms. Rashkov's version of the attack. Therefore, the jury was not left with a "he said, she said" credibility decision. And, defendant was given wide latitude to impeach Ms. Rashkov's credibility.

Moreover, the evidence was overwhelming that defendant committed a brutal assault on Ms. Rashkov that occurred over a significant period of time, at least 20 to 30 minutes even by defendant's version of events. The manner of the assault, as well as the nature of the stab wounds, indicated a gruesome attack on Ms. Rashkov, one that

transformed from punching into assaults with multiple weapons, and consisted of defendant stopping and starting the assault as he dragged Ms. Rashkov, from the living room, to the bedroom, and ultimately to the kitchen. The stab wounds which severed Ms. Rashkov's spinal cord were described by Dr. Hanpeter as requiring the use of "major force" to accomplish, and entered the back of Ms. Rashkov's neck, not the front, as they would have if Ms. Rashkov had been facing defendant and attacking him. The evidence of premeditation and sadistic intent was compelling. (See, e.g., *People v. Pride* (1992) 3 Cal.4th 195, 248 [multiple stab wounds mostly clustered near heart supported jury's determination victim's death was calculated and not the product of an "unconsidered explosion of violence"]; *People v. Garcia* (2000) 78 Cal.App.4th 1422, 1427-1428 [duration of time not test for premeditation as "[t]houghts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly"].)

Defendant's own testimony also largely belied his claim that Ms. Rashkov attacked him with a knife first, or that she had acted in any way threatening to him. He repeatedly admitted that Ms. Rashkov had been trying to help him that day, trying to calm him down, and trying to stop him from committing suicide. And during cross-examination, defendant equivocated as to his certainty that Ms. Rashkov attacked him with a knife, even though on redirect he then reasserted his belief she did.

Given the magnitude of evidence against defendant, we cannot conclude it is reasonably probable defendant would have obtained a more favorable outcome had the jury heard about the prior hearsay statement to Officer Lutges. Defendant has failed to establish prejudice.

c. Constitutional claim

Finally, defendant contends defense counsel should have sought admission of his statement to Officer Lutges on constitutional grounds, arguing that his right to due process and to put on a fair and complete defense would be impeded if the statement was excluded.

In *Chambers v. Mississippi* (1973) 410 U.S. 284 (*Chambers*), the United States Supreme Court held "where constitutional rights directly affecting the ascertainment of

guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." (*Id*. at p. 302.) Significantly however, the Court went on to explain that, by its ruling, it was *not* signaling a diminution in the validity or respect normally accorded to the states regarding their rules of criminal procedure and evidence, but only that, *given the unique facts of that case*, the court had found the defendant there had been deprived of a fair trial. (*Id*. at pp. 302-303.)

As explained above, the statement did not bear significant indicia of trustworthiness. Most importantly, it was made after defendant had a strong motive to fabricate. Defendant also has not made a compelling argument that the statement was material to his defense. Defense counsel's failure to make an argument under *Chambers* for the admission of the hearsay statement did not amount to ineffective assistance. (*Szadziewicz, supra,* 161 Cal.App.4th at p. 836.)

2. Custody Credits

Respondent concedes an error was made in calculating defendant's custody credits. We agree.

Defendant was taken into custody on January 7, 2009, was sentenced on August 30, 2011, and remained in custody during that entire period. Defendant was therefore entitled to 966 actual days of presentence custody credits to be applied against his term of imprisonment. (§ 2900.5; *People v. King* (1992) 3 Cal.App.4th 882, 886 [partial days count as full days in determining award of actual days served].) The trial court made an error of awarding only 963 actual days.[3] Despite the error, the 15 percent conduct credits awarded pursuant to section 2933.1 were correctly calculated at 144 days.

Defendant is entitled to an award of *total presentence custody credits of 1,110 days*, instead of the 1,107 days reflected on the abstract of judgment. The judgment is modified accordingly. We remand for the limited purpose of directing the trial court to

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3 The reporter's transcript and the minute order from the August 30, 2011 sentencing hearing reflect the court's award of 963 actual days. We note for the record that, in addition to the error in calculation, the abstract of judgment also contains a typographical error reflecting an award of 933 days of actual time served.

prepare and file an amended abstract of judgment reflecting the correct amount of custody credits and to transmit a copy of same to the relevant authorities.

DISPOSITION

The judgment is modified to reflect total presentence custody credits of 1,110 days, consisting of 966 actual days and 144 days of conduct credits. The trial court is directed to modify the abstract of judgment to so reflect, and to transmit a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects the judgment of conviction is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.